Supreme Court, U.S.
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No. 91-1304

In The

Supreme Court of the United States

October Term, 1991

WILLIAM LAMORTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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1. The Government inconsistently casts Petitioner's contention as both one that calls for "automatic reversal" where a prosecutor tells the jury that "the Government is too busy to prosecute innocent people" (Brf. at 4) and one that is "really not a rule for automatic reversal" (Brf. at 6). The Government's difficulties stem from its desire to employ the term, "automatic reversal," and to capitalize on this Court's aversion to any such mechanical rules. That term is not helpful here, however, because it suggests reversal of convictions without any reference to prejudice to a defendant, and Petitioner contends for no such rule. Rather, Petitioner maintains that prejudices *inheres* in such a remark by a prosecutor, and that there is

sufficient prejudice to require reversal where an objection to the remark is overruled, at the very least in cases where the credibility of the prosecution witnesses is the central issue.

The Government maintains that Petitioner offers no reason for believing that the prosecutor's argument that the Government is too busy to prosecute innocent people was, "by its nature," more prejudicial than matters at issue in the Court's other harmless error cases. (Brf. at 6) In fact, Petitioner offered not one, but several reasons why the improper argument here is *essentially* different and inherently prejudicial: such an argument is by its nature not susceptible to refutation by a defendant; it suggests that additional evidence not presented to the jury is available to the Government; it indicates a "policy" of the United States, which may induce a juror to trust in the Government's judgment; and it exerts a perverting influence on the jury's principal function, determining the credibility of the witnesses.

The Government's response to the idea that the prosecutor's argument suggested that there was additional evidence available to the prosecution is simply that "the court of appeals concluded that the prosecutor's remarks in this case 'cannot be read as implying that the prosecutor had access to evidence outside the record.' " (Brf. at 7, *citing* Pet. App. 7.) But simply citing the court of appeals' conclusion is no response at all, since it is to review this conclusion that Petitioner is seeking certiorari. The Government supplies no reasoned basis for the conclusion, nor could it. When a prosecutor tells the jury that the Government is too busy to prosecute innocent people, to conclude that the remark could not be considered by any

of the jurors as an indication that the prosecution had other evidence of the defendant's guilt is plainly unreasonable.

Thus, the Government is incorrect in stating that Petitioner's conviction would have been subject to harmless error analysis even in the Third Circuit, notwithstanding the holding of *United States v. DiLoreto*, 888 F.2d 996 (3d Cir. 1989). (Brf. at 6-7) The principle enunciated in *DiLoreto* with reference to a prosecutor's remark that "[w]e don't put liars on the stand" applies with equal if not greater force to a remark that "the Government is too busy to prosecute innocent people." By conveying the impression that extrajudicial considerations support the prosecution, each jeopardizes a defendant's right to be tried solely on the basis of evidence adduced at trial. *Id.* at 999.

2. The Government, for reasons self-apparently designed to obtain summary denial of this petition, characterizes as "fact-bound" Petitioner's challenge to the harmless error analysis employed by the court of appeals. There is absolutely nothing "fact-bound," or factual at all for that matter, about the question raised by Petitioner: where a prosecutor's improper remark subverts the jury's function in assessing the credibility of Government witnesses, should a reviewing court nevertheless credit those witnesses when determining whether the remark was harmless error? This question can be answered without *any* reference whatsoever to the particulars of those witnesses' testimony. The "overwhelming evidence" of guilt which the Government cites the Second Circuit as noting (Brf. at 7) consisted almost entirely of the testimony of cooperating witnesses. Non-testimonial corroboration

was negligible. Yet the court of appeals, in finding the evidence overwhelming, simply assumed as true the testimony of these witnesses, even though the error being analyzed impacted on the jury's credibility determination. Such wrong-headed and circular analysis should be reviewed by this Court without any need for detailed factual exegesis.

3. Finally, although subsidiary to the questions presented, Petitioner cannot leave unaddressed the Government's – and the court of appeals' – statements that defense counsel asserted in his closing argument that *the Assistant United States Attorney* had *fabricated* the case against Petitioner. (Brf. at 2, 4, 6 n. *) Defense counsel's argument, in fact, was that Drug Enforcement Administration agents had first mentioned Petitioner's name to the cooperating witnesses and that the witnesses, recognizing where their own interests laid, told the DEA agents whatever would get them the most lenient treatment. (*See* Appellant's C.A. Reply Brf. 5-6) Thus it was the witnesses *themselves* who counsel argued had fabricated the case against Petitioner, not the Assistant United States Attorney.

The block quotation in the Government's brief at 2 – misleadingly offered as an example of defense counsel's purported claim that the Assistant United States Attorney had concocted the case – was not a reference to any fabrication at all. Rather, as the context would make plain, it was a response to the Assistant United States Attorney's argument in summation disparaging the Government's own unsavory witnesses. Defense counsel simply argued that, since the Government based its case on

these witnesses, the prosecutor should not be permitted to disavow them at the same time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 23, 1992

Respectfully submitted,

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